

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 09-01738 CW

ARISTOTLE GARCIA, CARMELITA GARCIA
and AILEEN LIGGAYU,

ORDER GRANTING
DEFENDANT FDIC'S
MOTION TO DISMISS

Plaintiffs,

v.

INDYMAC and NDEX WEST,

Defendants.

Plaintiffs Aristotle Garcia, Carmelita Garcia and Aileen Liggayu charge Defendants IndyMac and NDEX West with violating California statutory and common law in connection with the sale of certain residential mortgage products. Defendant Federal Deposit Insurance Corporation, as duly appointed receiver for IndyMac Bank, has filed a motion to dismiss.¹ Plaintiffs oppose the motion. Having considered all of the papers filed by the parties, the Court GRANTS Defendant's motion.

BACKGROUND

On July 25, 2005, Plaintiffs Aristotle Garcia, Carmelita Garcia and Aileen Liggayu received a home mortgage loan from

¹The parties stipulated to substitute the FDIC in the place of Defendant IndyMac Bank.

1 IndyMac Bank with an annual percentage interest rate of 6.030. The
2 loan document states that Plaintiffs' initial monthly payments were
3 \$1,953.96 and that the payments might change on September 1, 2006
4 and on every twelfth month thereafter. The loan document also
5 notes that Plaintiffs' monthly payment cannot increase by more than
6 7.5% of the existing payment of principle and interest.

7 In April, 2008, Plaintiffs received a letter from IndyMac
8 stating that their monthly payment would increase to \$2,684.53 on
9 June 1, 2008. In June, 2008, Plaintiffs received another letter
10 from IndyMac stating that their monthly payment would be increased
11 to \$4,618.36. Plaintiffs could no longer afford the loan payments
12 and contacted a third-party loan modification officer, Lina
13 Villenas, to discuss their situation. On September 14, 2008,
14 Villenas called IndyMac to inquire about modifying Plaintiffs loan;
15 however, IndyMac refused to renegotiate the loan terms. In this
16 conversation, IndyMac notified Villenas that it planned to short-
17 sell the home.² From October, 2008 to January, 2008, Villenas
18 repeatedly called IndyMac to discuss Plaintiffs' situation but
19 IndyMac would not renegotiate the loan. On February 2, 4 and 11,
20 IndyMac sent Plaintiffs loan "work-out" packages, which Villenas
21 returned to IndyMac on February 12.³ On February 18, IndyMac
22 notified Villenas that Plaintiffs' house had been sold.

23 A few months later, on July 11, 2008, the federal government,
24 through the Office of Thrift Supervision, closed IndyMac Bank and

25 ²A short sale is the sale of a house in which the proceeds
26 fall short of what the owner still owes on the mortgage.

27 ³Plaintiffs do not define loan "work-out" packages, but the
28 Court infers that they are forms given to mortgagees to be filled
out when seeking a loan modification.

1 appointed the FDIC as the receiver pursuant to 12 U.S.C.
2 §§ 1464(d)(2)(A) and 1821(c)(5). As receiver, the FDIC's purpose
3 was to liquidate the liabilities of the failed bank, and to
4 administer the claims filed by creditors. The FDIC became the
5 successor in interest to and assumed all rights, titles, powers,
6 privileges and operations of IndyMac Bank. On the same date, the
7 OTS chartered a new institution, IndyMac Federal Bank, to which it
8 transferred all of the insured deposits and most of the assets of
9 the failed institution. The OTS then appointed the FDIC as the
10 conservator to operate the new institution. Thus, the FDIC was
11 operating in the dual capacity as receiver of IndyMac Bank and
12 conservator of IndyMac Federal Bank.

13 On March 2, 2009, Plaintiffs filed this case in San Mateo
14 County Superior Court asserting violations of California Civil Code
15 § 2923.5, Business and Professions Code § 17200 and negligence. On
16 April 21, 2009, the FDIC filed its notice of removal.

17 The Court notes that the record does not contain any proof
18 that Plaintiffs served Defendant NDEX WEST with the complaint
19 within 120 days after the complaint was filed. Fed. R. Civ. P.
20 4(m). Plaintiff must provide the Court with this proof by the
21 server's affidavit or risk having the complaint dismissed. Fed. R.
22 Civ. P. 4(1).

23 DISCUSSION

24 Once the FDIC becomes a receiver, all claims against a failed
25 bank must be examined through the administrative claims process
26 described in 12 U.S.C. § 1821(d)(3)-(20). This claims process is a
27 mandatory prerequisite to judicial review. § 1821(d)(13)(D). That
28 section provides:

1 Except as otherwise provided in this subsection, no court
2 shall have jurisdiction over
3 (i) any claim or action for payment from, or any action
4 seeking a determination of rights with respect to, the
5 assets of any depository institution for which the
6 Corporation has been appointed receiver, including assets
7 which the Corporation may acquire from itself as such
8 receiver; or
9 (ii) any claim relating to any act or omission of such
10 institution or the Corporation as receiver.

11 The phrase "'except as otherwise provided in this subsection'
12 refers to a provision that allows jurisdiction after the
13 administrative claims process has been completed." McCarthy v.
14 FDIC, 348 F.3d 1075, 1078 (9th Cir. 2003). This "exhaustion
15 requirement applies to any claim or action respecting the assets of
16 a failed institution for which the FDIC is receiver." Id. at 1081
17 (emphasis in original).

18 On March 10, 2009, Plaintiffs were sent a proof of claim form
19 and on April 28, 2009, the FDIC filed the instant motion to dismiss
20 asserting that Plaintiffs have failed to exhaust their
21 administrative remedy. On May 1, 2009 Plaintiffs returned the
22 proof of claim form and on May 22, 2009 the FDIC informed
23 Plaintiffs that their claim had been denied. However, this denial
24 does not mean that the Court now has jurisdiction over the matter.
25 Once a claim is denied, a claimant has sixty days from the date of
26 the denial to:

27 request administrative review of the claim in accordance with
28 subparagraph (A) or (B) of paragraph (7)⁴ or file suit on such
claim (or continue an action commenced before the appointment
of the receiver) in the district or territorial court of the
United States for the district within which the depository
institution's principal place of business is located or the
United States District Court for the District of Columbia (and

27 ⁴These subparagraphs state that claimants are entitled to
28 either an administrative hearing or some form of alternative
dispute resolution.

1 such court shall have jurisdiction to hear such claim).
2 12 U.S.C. § 1821 (d)(6)(A). Therefore, at this juncture,
3 Plaintiffs may either seek a second administrative review or
4 commence a new suit in the United States District Court for the
5 District of Columbia or the United States District Court for the
6 Central District of California (the principal place of business for
7 IndyMac is Pasadena, California). Plaintiffs cannot continue
8 litigating in this Court because they did not file their claim
9 prior to the appointment of the FDIC as receiver. Thus, the Court
10 does not have jurisdiction to hear Plaintiffs' claims.

11 CONCLUSION

12 For the foregoing reasons, the Court grants Defendant FDIC's
13 motion to dismiss, without prejudice to filing a new suit in
14 accordance with this order. The Court vacates the hearing
15 scheduled for June 11, 2009.

16 IT IS SO ORDERED.

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18 Dated: 06/08/09



19 CLAUDIA WILKEN
20 United States District Judge
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